Supreme Court, U.S.
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No. 01-0319

In the Supreme Court of the United States

TISBURY TOWING & TRANSPORTATION CO., INC.,
f/k/a PACKER MARINE, INC.,
Petitioner,

v.

TUG VENUS and TUCKER-ROY
MARINE TOWING & SALVAGE, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

Respondent now argues that to "document" a marine casualty, an unmanned, dumb barge owner has a duty to act on third- or fourth-hand "scuttlebutt" which he deemed unreliable and even his declarant retracted. Brief in Opposition at 5-6; Respondent's App. at 2-3. There are five problems with Respondent's argument.

First, assuming Petitioner had acted on such multiple hearsay, investigating and hiring a diver to inspect the bottoms of its fleet in August 1994 as suggested by Respondent, Brief in Opposition at 5-6; Respondent's App. at 7-8, that still would not have provided any documentation of the VENUS grounding *date* or *barge involved.* Respondent would have simply accelerated its "agnosticism" due to the lack of VENUS log entries and accident reports required by Coast Guard regulations. See Petition for Writ of Certiorari at 7.

Second, Respondent's discussion of trial testimony is incomplete. Regarding Mr. Olmstead, he immediately retracted his third- or fourth-hand hearsay in August 1994. Respondent's App. at 2-3. Respondent then misstates that "Petitioner also received similar information from at least two other sources." Brief in Opposition at 5. But regarding Mr. Lynch, the date of unspecified "[w]aterfront gossip" he overheard on the radio is unsure, but "might have been before" March 1995. Respondent's App. at 5. And regarding Mr. Mitchell, re-direct clarified it was not until 1997 that Petitioner received information about a grounding from him. Petitioner's Reply App. E at 30a.

Third, Respondent contends that 46 C.F.R. § 4.05.1 (1988) is irrelevant because it does "not require Respondent

owner or the Coast Guard to notify Petitioner of the casualty once reported." Brief in Opposition at 6 n.1. Respondent misses the point. Had Respondent complied with 46 C.F.R. § 4.05.1, the Coast Guard would have documented the date of the grounding and the name of the barge involved and would have routinely insisted that Respondent fill out a Form CG-2692 and Form CG-2692A (Barge Addendum) within five days, as required by 46 C.F.R. § 4.05-10(a)(1987). A Coast Guard inspection of the barge involved would then have followed (as shown by the cases cited in the Petition for Writ of Certiorari at 3, which are not inapposite) and this case would have been resolved years ago.

Fourth, it is curious that Respondent states "Petitioner shifted its approach" after the district court's ruling, Brief in Opposition at 3, since Respondent's burden of producing evidence in view of its failure to report the grounding to the Coast Guard was central to (Plaintiff's Proposed) Findings and Conclusions, A. 278-79.

Fifth, as a matter of maritime policy, Respondent now contends that the remedy for omitted VENUS log entries and required Coast Guard accident reports is initiative based on multiple, retracted hearsay. Not only does the First Circuit opinion condone maritime concealment in violation of regulations, but now Respondent contends that expectations of regulatory violation and bad faith should be the commercial standard, which is the logical next step.

CONCLUSION

In sum, Respondent's argument that despite its reporting violations Petitioner suffered no prejudice due to waterfront scuttlebutt is contrary to fact, law, and policy. Stevens v. The White City, 285 U.S. 195 (1932), does not

control here because threshold facts "peculiarly within the knowledge of the respondents" were withheld in violation of Coast Guard reporting regulations. Because it is dangerous for maritime commerce to condone those violations, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 97-11392-RGS

PACKER MARINE, INC.

v.

TUG VENUS, in rem, and
TUCKER-ROY MARINE
TOWING & SALVAGE, INC.,
in personam

CIVIL ACTION

BEFORE THE HONORABLE RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE
BENCH TRIAL, DAY 1
May 10, 1999

* * *

[106] Q. Now, let me – finally, let me ask you, you mentioned on your cross-examination by Mr. Peloquin that Charlie [107] Mitchell told you about grounding damage on

the VENUS, I believe your testimony was, sometime during the summer of 1994.

Is that really – is that really your recollection?

A. If we went backwards, so to speak, at one time he called and said – he gave – he gave us a person that we might want to contact, and that is when he talked to – and reconstruct that and contact that person.

Q. Now, what was the information that he provided to you during that conversation?

A. He said that he knew the skipper of the VENUS on the night of June 15.

Q. What other information did he provide to you at that time?

MR. PELOQUIN: Your Honor, I'm going to object and put on the record that there is a stipulation between parties regarding the testimony of Mr. Mitchell. It was done sometime ago in correspondence, and plaintiff's counsel has told me that Mr. Mitchell had no personal knowledge of the incident, and I consider the identity of the skipper to be personal knowledge.

THE COURT: Overruled.

Q. What did Mr. Mitchell tell you –

MR. FARRELL: I'm sorry?

[108]**THE COURT:** Overruled.

Q. What did Mr. Mitchell – when did Mr. Mitchell mention to you there was grounding damage, that he understood, on the VENUS?

A. I think that we go back to when he said there was a person that was on the VENUS, and that was, maybe, three or four months before you actually had an opportunity to speak to that person.

Q. Okay.

So was this – now, was this after I was involved in the case or was it before?

A. I would say it was after.

Q. The person that you're talking about who you understood perhaps to be the skipper was who?

A. A gentleman named Mr. Correia.

Q. So do you recall when my office became involved in the case?

A. I'm not exactly sure.

Q. If I were to represent to you that it was in the spring of 1997, would you disagree with that?

A. No, that would be – you were engaged at that time.

Q. And can you describe some of the frustrations that you've understood from me that we had in investigating this case regarding, say, the date of the haul out, do you remember?

[109] A. The date?

Q. The date of the VENUS haul out at Fairhaven Shipyard. Do you recall some of the problems that we had?

A. You were never able to acquire that information until you must have made a visit to Fairhaven Shipyard and they did tell you the date, which was, I believe, June 20.

Q. And what about Dave Correia, do you remember some of the problems that our office specifically had in contacting him?

A. It took almost three months for you to make an appointment with him to see him in Providence, as I remember.

MR. FARRELL: Nothing further, your Honor....

* * *